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In the Supreme Court of the United States

OCTOBER TERM, 1961

No. 921

UNITED STATES PIPE AND FOUNDRY COMPANY,
PETITIONER

v.

NATIONAL LABOR RELATIONS BOARD

ON PETITION FOR A WRIT OF CERTIORARI TO THE UNITED STATES COURT OF APPEALS FOR THE FIFTH CIRCUIT

BRIEF FOR THE NATIONAL LABOR RELATIONS BOARD IN OPPOSITION

OPINIONS BELOW

The opinion of the court of appeals (Pet. App. 17–30) is reported at 298 F. 2d 873. The Decision and Order of the National Labor Relations Board (Pet. App. 31–40) are reported at 129 NLRB 357.

JURISDICTION

The judgment of the court of appeals was entered on February 1, 1962 (Pet. App. 17, 26). The petition for a writ of certiorari was filed on April 30, 1962. The jurisdiction of this Court is invoked under 28 U.S.C. 1254(1).

QUESTION PRESENTED

Whether unions representing employees at different plants of the same employer refuse to bargain in violation of Section 8(b)(3) of the National Labor Relations Act, when, in the course of negotiations for separate contracts for each plant, they each insist, in good faith, that the contracts shall terminate on a common date.

STATUTES INVOLVED

In addition to the statutory provisions set forth at pp. 41–42 of the petition, the relevant provisions of the National Labor Relations Act, as amended (61 Stat. 136, 29 U.S.C. 151, *et seq.*), are as follows:

> SEC. 8. (d) For the purposes of this section, to bargain collectively is the performance of the mutual obligation of the employer and the representative of the employees to meet at reasonable times and confer in good faith with respect to wages, hours, and other terms and conditions of employment, or the negotiation of an agreement, or any question arising thereunder, and the execution of a written contract incorporating any agreement reached if requested by either party, but such obligation does not compel either party to agree to a proposal or require the making of a concession
> * * *

STATEMENT

A. THE BOARD'S FINDINGS OF FACT

Petitioner manufactures cast iron pipe at several plants throughout the country, including one at Besse-

mer, Alabama, another at North Birmingham in that State, and a third at Burlington, New Jersey (R. 37).[1] Pursuant to certifications issued by the Board in 1940, the Molders[2] and its Local 256 have represented petitioner's employees at the North Birmingham plant (R. 38; J.A. 3), while the Steelworkers[3] and its Local 2140 have represented a comparable unit consisting of the employees at the Bessemer plant, except for several craft groups represented by other unions (R. 38; J.A. 2–3). Through another local and pursuant to a Board certification issued in 1942, the Steelworkers also represented employees of petitioner at its plant at Burlington, New Jersey (R. 38; J.A. 3).[4]

In 1959, the Steelworkers' contracts at the Burlington and Bessemer plants had expiration dates of August 20 and October 31, respectively (R. 39; J.A. 5, 132). At Burlington, the parties failed to reach agreement on the terms of a new contract and, the Steelworkers called a strike on or about August 20 (R. 38–39; J.A. 86, 110). A few days later, the Steelworkers started negotiating with management representatives at Bessemer (R. 38; J.A. 13–14). Here, again, an impasse developed, and the Union called a strike commencing October 31 (R. 39; J.A. 43).

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[1] "R." references are to the "Transcript of Record" filed with the court below as Volume I; "J.A." references are to the Joint Appendix filed in that court.

[2] International Molders and Foundry Workers of North America, AFL–CIO.

[3] United Steelworkers of America, AFL–CIO.

[4] Steelworkers Local Union 2026, representing the Burlington employees, was not named as a party to the Board case.

that their employer declines to recognize their representative as the representative defined in section 9 (a), or (ii) assert that the individual or labor organization, which has been certified or is being currently recognized by their employer as the bargaining representative, is no longer a representative as defined in section 9 (a); or

(B) by an employer, alleging that one or more individuals or labor organizations have presented to him a claim to be recognized as the representative defined in section 9 (a);

the Board shall investigate such petition and if it has reasonable cause to believe that a question of representation affecting commerce exists shall provide for an appropriate hearing upon due notice. Such hearing may be conducted by an officer or employee of the regional office, who shall not make any recommendations with respect thereto. If the Board finds upon the record of such hearing that such a question of representation exists, it shall direct an election by secret ballot and shall certify the results thereof.

At North Birmingham, meanwhile, petitioner had been operating under a comparatively new contract with the Molders, which went into effect on June 1, 1959 (J.A. 53). That agreement was not due to expire until July 31, 1960, but it contained a "reopening" provision. Pursuant thereto, the Molders served notice on November 2 that its members desired to renegotiate certain matters (R. 39–40; J.A. 53, 154). The parties started bargaining at that plant about mid-November, but failed to reach agreement, and the Molders called a strike beginning January 26, 1960 (R. 39; J.A. 56, 58).

Early in the Bessemer negotiations, the Steelworkers representatives proposed that the new contracts at Bessemer and Burlington have the same expiration dates (J.A. 99, 103). At a bargaining conference on October 14, Steelworkers Representative Yates added that he would "like to" see the North Birmingham contract terminate on the same date also, but could not speak for the Molders Union, the representative of the North Birmingham employees (J.A. 99). Two months later, however, the Molders were in the midst of renegotiating their contract (J.A. 115), and Yates announced that both Unions were now demanding the same expiration date for the North Birmingham as well as the Bessemer and Burlington contracts (J.A. 117–118). The Unions were "together" on this point, Yates declared, and the Molders, as well as the Steelworkers' local at Burlington, were "willing to go along" with whatever date the Bessemer negotiators might agree upon (J.A. 118). The Steelworkers spokesmen maintained

this position from that time forward, always demanding the same expiration date for all three contracts, and reiterating several times that the Molders endorsed this demand (J.A. 120, 123, 126, 129, 135, 142, 144, 145, 147). Although indicating a preference for May 1, they added that the Steelworkers and the Molders would be willing to accept any date designated by petitioner, so long as it was the same termination date for all three contracts (J.A. 118, 137–139, 140–141, 142, 147–148). In support of their demand for the same termination date for all three contracts, the Steelworkers pointed out that the three pipe plants did interchangeable work, and that petitioner's practice had been to shift its production orders from one plant to another as it was faced with successive contract negotiations and strikes (J.A. 96, 118, 113–114). In 1959, for example, the two Alabama plants began to work overtime when the Burlington strike started in August, and North Birmingham continued on overtime after Bessemer went on strike at the end of October (J.A. 86, 149). The Steelworkers' negotiators asserted that the same thing had happened in prior years (J.A. 96, 118). As Union Representative Yates put it (J.A. 127):

> They [the Company managers] work one union against the other—it has caused all these strikes and that is the only way we know to avert these strikes. When we have a strike at Bessemer they operate in Birmingham—they do the same thing in Burlington. It would be for the benefit of all concerned if we could get a common expiration date. I think we

> have a good reason for it. We have all agreed to it and that is what we are striving for.[5]

The Company did not deny that it had taken advantage of the different contract expiration dates in the manner claimed by the Steelworkers (J.A. 149), but declined to consider any termination date for the Bessemer plant except October 31 (R. 40; J.A. 27, 138, 140, 143, 147, 150). The Bessemer personnel director, Nolan, pointed out, at a meeting held on March 23, 1960, that three of the craft unions then renegotiating their contracts covering other units at Bessemer had accepted October 31, 1961, as the new expiration date (J.A. 133, 146). In these circumstances, he added, it would not be feasible to have the Steelworkers' contract expire at a different time, since a strike by only one craft could shut down the entire plant (J.A. 133, 28).

So far as the issue of contract expiration date was concerned, the Molders' negotiations at North Birmingham took the same course as the Steelworkers' negotiations at Bessemer (R. 40; J.A. 59–65, 69–71). Some time before the January 26 strike began, the Molders informed Personnel Director Horn that "the unions" at Bessemer, Burlington, and North Birmingham had all agreed that they wanted the same expiration date for their new contracts (J.A. 60, 61). The

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[5] The Steelworkers also explained that they desired to avoid wage disparities between the neighboring plants in Alabama. Thus, the Molders had been able to obtain a wage increase for the North Birmingham employees effective June 1, five months before the Steelworkers, with a contract running to October 31, could demand a comparable increase for the employees at Bessemer (J.A. 105, 120, 123).

Molders spokesman gave the same reason for this position that the Steelworkers representatives advanced in the conferences at Bessemer, stating that (J.A. 60):

> When one plant was down the company used the other two plants to whip the [striking] union, by keeping them in production and increasing their production; and * * * would beat the union that was on a strike by that method.

The Molders, like the Steelworkers, particularly wanted May 1, but indicated that some other expiration date would be acceptable if it were adopted at all three plants (J.A. 70).

Personnel Director Horn refused to discuss the subject of a common termination date, taking the position that the Molders' demand was not "legitimate" (J.A. 63). Horn told the negotiators that the Company wanted an expiration date of January 26 at North Birmingham, and that no other date would do, no matter how long the employees stayed out on strike (J.A. 70, 76).

B. THE BOARD'S DECISION

Upon charges filed by the Company, the General Counsel of the Board issued a complaint alleging that the Unions, by insisting upon a common termination date for their contracts, had refused to bargain in violation of Section 8(b)(3) of the Act. At the close of the General Counsel's case, the Unions moved to dismiss the complaint (R. 36; J.A. 92-93). The Trial Examiner granted the motion, on the ground that the termination date of a contract is a mandatory bar-

gaining subject under the Act and it does not lose that character merely because the unions, representing different plants of the same employer, insist on a common date for all three contracts (Pet. 33–40). Petitioner took an appeal to the Board, which upheld the dismissal of the complaint. The Board stated that "contract duration is a bargainable issue," that the Unions' insistence upon "specific expiration dates was not evidence of bad faith bargaining," and thus that a *prima facie* violation of Section 8(b)(3) had not been established (Pet. 32).

C. THE DECISION OF THE COURT OF APPEALS.

The court of appeals, District Judge Carswell dissenting, sustained the Board's dismissal of the complaint (Pet. 17–26). Although agreeing with the Trial Examiner that the Unions were insisting on a "common" termination date by design, and not by coincidence (as the Board had viewed the record), the court concluded that the Unions' demand still remained within the area of mandatory bargaining. The court stated (Pet. 25):

> Under the facts of this case viewed realistically, a common expiration date of all three contracts had a vitally important connection with the "wages, hours and other terms and conditions of employment" of the employees at each plant. Without a common expiration date, any union striking for a new contract on a different date, might have to "bail with a sieve" while the employer shifted its production activities to the other plant or plants. With a common expiration date, it is obvious

that each union might be able to negotiate a more advantageous new contract for the employees represented by that union.

ARGUMENT

The decision of the court of appeals involves an unusual factual situation; it is clearly correct, and there is no conflict of decisions. No issue warranting review by this Court is presented.

1. Section 9(a) of the Act provides that a representative selected by a majority of the employees in an appropriate unit shall be the exclusive representative "of all the employees in such unit for the purposes of collective bargaining in respect to rates of pay, wages, hours of employment, or other conditions of employment." Section 8(a)(5) imposes on the employer the duty to bargain collectively with such representative, and Section 8(b)(3) imposes a reciprocal obligation on the representative to bargain collectively with the employer. Insofar as here revelant, this means that, as to matters involving "wages, hours of employment, or other conditions of employment" of the employees in the unit represented, either party may, so long as it is acting in good faith, insist upon a position to and beyond the point of impasse; but that, as to demands outside of this area, which are not in themselves violative of the terms or policy of the Act, the parties, although at liberty to propose and agree respecting them, may not lawfully insist upon their inclusion as a condition to any contract.[*] Here, three unions, representing different units of

[*] See Section 8(d); *National Labor Relations Board* v. *Borg-Warner Corp.*, 356 U.S. 342.

employees at three plants of the same employer, insisted in good faith, in the course of separately negotiating contracts for their respective units, that the contracts all have a common termination date. The narrow question presented is whether, in the circumstances of this case, this demand has a reasonable relation to the "wages, hours of employment, or other conditions of employment" of the employees in the unit represented by each union and was thus within the area of mandatory bargaining, or whether it was not so related and hence fell outside of that area. This precise question, which turns largely on the particular situation which existed at petitioner's plants, has not previously arisen before the Board; accordingly it is not, at the present time, of general importance in the administration of the Act.

In any event, the conclusion of the Board, affirmed by the court below, that the Unions' demand for a common termination date did not violate the bargaining obligation imposed by Section 8(b)(3) of the Act is manifestly correct. As Judge Rives pointed out for the court below (Pet. 25), "viewed realistically, a common expiration date of all three contracts had a vitally important connection with the 'wages, hours and other terms and conditions of employment' of the employees at each plant." Should the employees whose contract expires first not accept the Company's initial proposal and strike, they would "have to 'bail with a sieve' while the employer shifted its production activities to the other plant or plants" still under contract (*Ibid.*). Indeed, the record shows that this was precisely why the Unions sought a common ex-

piration date. In the past the Company, taking advantage of the different contract expiration dates, had shifted its pipe production from Burlington to the Alabama plants; and then from Bessemer to North Birmingham, working the employees overtime at the plant or plants still under contract and not able to strike (*supra*, pp. 5–6). In this situation, the termination date of the other contracts had a direct bearing on each Union's ability to bargain effectively for the employees which it represented. Each Union thus had as much right to insist that the contracts at all three plants expire at the same time, as the petitioner had in insisting that they all expire at different times.[2] Cf. *National Labor Relations Board* v. *Landis Tool Co.*, 193 F. 2d 279, 282 (C.A. 3).

2. Contrary to petitioner's contention (Pet. 7–14), the issue here is not the same as that in cases such as *Douds* v. *International Longshoremen's Ass'n*, 241 F. 2d 278 (C.A. 2), which hold that a union violates its statutory duty to bargain when it insists that any agreement reached cover, not only the employees in the unit which it represents, but also other employees as well. In the latter situation, the union is attempting to establish terms and conditions of employment for employees who are outside the unit immediately involved in the contract negotiations, and who, indeed, may not wish to be represented by the union. Here, on the other hand, each Union was negotiating

[2] Petitioner insisted on an October 31 expiration date for the contract at Bessemer, because that was the date of the craft union contracts and "it makes a better operation" for all contracts at the same plant to expire on the same date (J.A. 28, 133, 140, 146).

separately a contract which would cover only the employees in the unit which it represented, and in demanding a common termination date for that contract, it was seeking, not to enlarge its representative status, but merely adequately to protect the interests of the unit represented. To be sure, in arriving at a decision as to termination date, each Union took into account the effect of employment conditions in the other units, but such recognition of the relation among the various plants of a single industrial operation can hardly be regarded as a negation of the separate identities of the various bargaining units. To take a contrary view, as does petitioner and the dissenting judge (Pet. 26–30), "is to make situations that are different appear the same" (*Brooks* v. *National Labor Relations Board*, 348 U.S. 96, 104).

CONCLUSION

For the foregoing reasons, the petition for a writ of certiorari should be denied.

Respectfully submitted,

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